Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-272

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,

Petitioner,

v.

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,

Respondent,

and

BANK OF THE COMMONWEALTH,

Respondent.

No. 76-271

BANK OF THE COMMONWEALTH,

Petitioner,

v.

ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt,

Respondent,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, as successor in interest to Franklin National Bank,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND COURT

JOINT APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 721—September Term, 1975

Argued March 12, 1976 Decided May 25, 1976

Docket No. 75-5020

In the Matter

of

ISRAEL-BRITISH BANK (LONDON) LIMITED,

Bankrupt.

ISRAEL-BRITISH BANK (LONDON) LIMITED,

Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as successor in interest to Franklin
National Bank, and BANK OF THE COMMONWEALTH,

Appellees.

Before FRIENDLY, MULLIGAN and GURFEIN, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Morris E. Lasker, *Judge,* dismissing a voluntary bankruptcy petition by a foreign banking corporation not authorized to do business in

the United States, on the ground that it was a "banking corporation" and, hence, ineligible to file a voluntary petition for bankruptcy under § 4a of the Bankruptcy Act, 11 U.S.C. § 22(a).

Reversed.

GURFEIN, *Circuit Judge*:

The Israel-British Bank (London) Ltd. ("IBB") was a British bank engaged in the banking business in London. It did no banking business in the United States, nor was it licensed in any state to do such business. It did borrow Eurodollars and U.S. dollars from American banks, including appellees, among others. It also maintained deposits in United States banks.

On July 11, 1974, a loan of Eurodollars made to it by the Franklin National Bank ("Franklin"), the principal and interest amounting to approximately $2,100,000, became due and was not paid. On July 15, 1974, a loan of U.S. Dollars made to it by the Bank of the Commonwealth ("Commonwealth"), a Michigan bank, in the amount of $500,000 plus interest, became due and was not paid.

On July 22, 1974, Commonwealth started an action against IBB in the Southern District of New York to recover its loan with interest and obtained an order of attachment in the sum of $515,385.42 plus probable interest. The order of attachment was served on a number of banks holding deposits of IBB and attachments were made.

On July 26, 1974, Franklin followed suit and obtained an order of attachment which was served on a number of banks in New York. Commonwealth made personal service on IBB in London on August 6, 1974, and obtained a final default judgment for $519,923.90, which was entered in the Southern District on September 11, 1974. Franklin itself is now being liquidated by appellee Federal Deposit Insurance Corporation.

In the meantime, while these matters were proceeding in the federal court, IBB, being unable to pay its debts, voluntarily filed a debtor's petition for the winding up of its affairs, pursuant to Section 222 of the English Companies Act, 11 & 12 Geo. 6, c. 38 (1948), with the High Court, Chancery Division, of the United Kingdom.[1] On August 6, 1974, a receiving order was made by that court constituting Arthur Thomas Cheek, Senior Official Receiver, as Receiver and Provisional Liquidator of the property of petitioner.

On September 23, 1974, before Franklin could obtain a judgment, and before Commonwealth could compel payment of the default judgment it had obtained, IBB filed a voluntary petition in bankruptcy in the Southern District of New York. It was adjudicated a bankrupt on the same day. The appellees promptly filed motions to vacate the adjudication and to dismiss the involuntary petition on the ground that the Bankruptcy Court lacked jurisdiction over the subject matter.

While the motions were *sub judice* before Bankruptcy Judge Galgay, the High Court in England issued an order dated October 9, 1974 authorizing the appointment of counsel in New York "to take such steps and to institute such proceedings including the filing of a bankruptcy petition against the company as they may advise and as the said Official Receiver may authorize them to take to insure that the assets of the said company situate in the United States of America become available for the benefit of creditors general."

We take the bankruptcy proceeding here to be in aid of the order of the High Court that the assets in the United

1. In the United Kingdom, companies (corporations) cannot be made bankrupt. Bankruptcy Act, 4 & 5 Geo. 5, c. 59, § 126 (1914). Accordingly, companies go through the equivalent winding-up procedure prescribed by the Companies Act, 1948. See Charlesworth's Company Law 356 (9 ed. T.E. Cain 1968).

States become available to the creditors on the basis of equality. If the assets involved had been situated in the United Kingdom, the High Court could have restrained and set aside the atachment and judgment as having been made within six months of the petition for winding up. See Companies Act, 11 & 12 Geo. 6, c. 38, § 320(1) (1948). But the High Court, of course, has no extraterritorial jurisdiction beyond the United Kingdom.

If there is jurisdiction to sustain the American adjudication in bankruptcy of IBB, the American trustee will be in a position to bring a proceeding for avoidance of liens obtained by attachment or judgment within four months of the filing of the petition if the bankrupt was insolvent at the time. Bankruptcy Act § 67a(1), 11 U.S.C. § 107(a)(1). If there is no jurisdiction to entertain a voluntary bankruptcy petition for IBB, the liens will be good, and appellees will fare better than United States creditors—among others.

Section 4a of the Bankruptcy Act, 11 U.S.C. § 22(a), on which appellees' motion to vacate and dismiss was grounded, provides as follows:

> "Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan asociation, shall be entitled to the benefits of this title as a voluntary bankrupt."

IBB, if it is considered simply as a foreign corporation, was entitled to voluntary bankruptcy under Section 2a(1) of the Bankruptcy Act, 11 U.S.C. § 11(a)(1), even though it did not have its "principal place of business . . . or . . . domicile" in the United States, since it had property "within their jurisdiction" (*i.e.*, within the jurisdiction of the Bankruptcy Courts of the United States). As the Bankruptcy Judge found, IBB had property in the Southern District in the form of deposits of money held by five banks in New York City.

Appellees maintain, however, that IBB is a "banking corporation" and, as such, is not entitled to the benefits of voluntary bankruptcy. Bankruptcy Judge Galgay, in a thorough opinion, held that IBB was not a "banking corporation" within the meaning of the Bankruptcy Act and denied the motions to dismiss the voluntary petition. On appeal, the District Court, Morris E. Lasker, *Judge,* in an equally scholarly opinion, reversed the decision of the Bankruptcy Court and dismissed the petition in bankruptcy. 401 F. Supp. 1159 (S.D.N.Y. 1975). This appeal followed.

The case is one of first impression and involves an interesting question of statutory construction. We have concluded that the petition in bankruptcy by IBB should not have been dismissed. We accordingly reverse.

All parties have briefed the legislative history of Section 4 quite extensively in an attempt to find some elusive clue to its meaning. Judge Lasker ultimately concluded that "when Congress in 1898 and 1910 specified in § 4 of the Bankruptcy Act who may and may not be adjudicated a bankrupt, it did not specifically address the question before us: Does the Bankruptcy Court have jurisdiction to entertain a foreign banking corporation's voluntary petition in bankruptcy?" 401 F. Supp. at 1160. Though recognizing that Congress had not specifically addressed the question, the judge, after exploring whether application of the exception to foreign banks "would further or would thwart the objectives of the statute," *id.* at 1170, felt constrained to follow the "plain meaning" of the words.

There is no field in which contrary conclusions based on contrary premises may be so readily drawn as in the interpretation of statutes. In a sense, each statute stands on as own. And it may be disputed whether words, even in their common-sense meaning, bring a sure guide to interpretation of every statute. As Justice Frankfurter noted, "[o]ne must also listen attentively to what it [the statute]

does not say." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 Colum. L. Rev. 527, 536 (1947). This statute says nothing about "foreign banking corporations" as such.

If we acknowledge, as did the District Court, that Congress failed to consider *foreign* banking corporations when creating the exceptions to eligibility for bankruptcy, are we, nevertheless, required to recognize within the exception what was never in its consideration? There is no plain meaning in "banking corporation" to compel such a result. See *McBoyle* v. *United States,* 283 U.S. 25 (1931), where Justice Holmes found that an airplane was not a "motor vehicle" though it was propelled by a motor.

Since we cannot find a final answer in the words themselves, we must employ other methods. We may consider the history of the phrase as it finally evolved, with particular reference to the language used in earlier statutes. We may also search for the policy intended to be enacted. As Justice Cardozo wrote: "[The words] came into the statute . . . freighted with the meaning imparted to them by the mischief to be remedied." *Duparquet Huot & Moneuse Co.* v. *Evans,* 297 U.S. 216, 220-21 (1936). Here the inquiry is not philological; it is rather a search for legislative purpose, which is sometimes no more than a quest for a collective will that probably never existed. When the words create a general inclusionary category there is greater reason, perhaps, to accept a literal meaning in the absence of any particular purpose which contradicts it. When the statute is couched in terms of an exception, however, the task is somewhat different, for in the case of an exception we can hardly assume that excluding a particular category from a general class was utterly without purpose. If we find that there was a legislative purpose for the general exception which does not fit the narrower exception at issue, a court may justifiably conclude that the exception at issue is without the statute.

Thus, the normal rule of construction is that where words of exception are used, they are to be strictly construed to limit the exception. *Korherr* v. *Bumb,* 262 F.2d 157, 162 (9 Cir. 1958); see *Piedmont & Northern Ry.* v. *ICC,* 286 U.S. 299, 311-12 (1932); *Midland Cooperative Wholesale* v. *Ickes,* 125 F.2d 618, 626 (8 Cir.), *cert. denied* 316 U.S. 673 (1942); *In re Bay Cities Guaranty Building-Loan Ass'n,* 48 F.2d 623, 624 (S.D. Cal. 1931). As the Court said in *Piedmont & Northern Ry.* v. *ICC, supra,* 286 U.S. at 311-12:

> "The . . . Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended."

The theme of the Bankruptcy Act is equality of distribution of assets among creditors, *Sampsell* v. *Imperial Paper & Color Corp.,* 313 U.S. 215, 219 (1941); *Buchanan* v. *Smith,* 83 U.S. (16 Wall.) 277, 301 (1873); 3 *Collier on Bankruptcy* ¶ 60.01, at 743; see *Young* v. *Higbee Co.,* 324 U.S. 204, 210 (1945), and correlatively avoidance of preference to some. 1 *Remington on Bankruptcy* § 17, at 34 (5 ed. J. Henderson 1950). The road to equity is not a race course for the swiftest.

We start with the recognition that a foreign corporation which has assets in the United States is generally amenable to bankruptcy here. IBB is such a body under Section 2 of the Act. To find that it is excluded from the general class of entities amenable to bankruptcy one would have to find a reason which illuminates the exception. We can find no convincing reason why a foreign banking corporation, not licensed to do business in the United States, conducting no semblance of a banking business here, and not under the regulatory supervision of any state or federal agency, should not qualify for the benefits of the Act as a voluntary bankrupt.

In reading federal statutes, we must also remember that the statues are written with our federal system in mind. They normally reflect divisions of power between the federal government and the states of the union. Courts over the years have recognized that Section 4 provides for a division of power between the federal government and the states. See *In re Union Guarantee & Mortgage Co.*, 75 F.2d 984 (2 Cir.), *cert. denied*, 296 U.S. 594 (1935); *Woolsey* v. *Security Trust Co.*, 74 F.2d 334, 337 (5 Cir. 1934); *In re Equity Funding Corp. of America*, 396 F. Supp. 1266, 1275 (C.D. Cal. 1975); *In re Supreme Lodge of the Masons Annuity*, 286 Fed. 180, 184 (N.D. Ga. 1923).

So far as Congressional policy can be found for the exclusion of "banking corporations" from the benefit of the Bankruptcy Act, it is this. National banks were always subject to separate federal supervision and regulation, including their liquidation. State banks, chartered by the states, were subject to similar state regulation. No question of voluntary bankruptcy arose under the 1898 Bankruptcy Act, for no corporation *of any kind* was entitled to file a petition for voluntary bankruptcy under that Act. Under the 1898 Act any unincorporated company, as well as corporations of certain types, that is, those "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits," could be adjudged an involuntary bankrupt, however. But national banks and state-chartered banking corporations were excluded. Section 4b of the 1898 Act specifically provided that "[p]rivate bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts." Thus, it was apparently not the circumstance of being in the banking business that controlled, for private bankers were in that business as well. It was rather the existence of federal or state regulation of chartered banks.

This was articulated by the sponsor of the bill, Senator William Lindsay, 30 Cong. Rec. 606 (1897), and by the

Report of the House Judiciary Committee, H.R. Rep. No. 65, 55th Cong., 2d Sess. 40 (1897), which, as the District Judge recognized, "noted the existence of other insolvency provisions as a reason for excluding national banks." 401 F. Supp. at 1164. That report stated:

> "The bill exempts national banks from being proceeded against in bankruptcy, for the reason that Congress has legislated especially in respect to them, and the most careful provisions exist for protecting all interests connected by the national banking laws."

The Conference Committee added the exception for banks incorporated under state law, simply explaining that they "are left to be dealt with by the laws of the State creating them." The inference is that considerations of federalism required that the states be allowed to liquidate as well as to regulate their own creations.

The 1910 amendments for the first time made corporations eligible for voluntary as well as involuntary bankruptcy. Amended Section 4a permitted any "person," which included any corporation "except a municipal, railroad, insurance, or banking corporation," to become a voluntary bankrupt. Similarly, Section 4b was amended to provide that "any moneyed, business, or commercial corporation" could be adjudged an involuntary bankrupt, "except a municipal, railroad, insurance, or banking corporation." The corporations excepted seem to be the same corporations that were excluded from the 1898 Act's provisions. The sponsor of the amendments to Section 4, Congressman Sherley, acknowledged this when he said:

> "There has been excepted out of the law *always* certain corporations—for instance, municipal, railroad, insurance, or banking corporations—on the theory that all of those corporations partook either of a public or quasi-public nature that did not warrant their estates being adjudicated through bankruptcy proceedings, and that it was wiser to hold

> them exempt from the law than to permit them to be thrown into bankruptcy by either voluntary or involuntary proceedings. This amendment does not, in that particular, change the law at all."

Hearing on H.R. 18694 Before Subcomittee No. 1 of the House Commitee on the Judiciary, 60th Cong., 2d Sess. (1909) (emphasis added).

This language does not, to be sure, prove that Congress intended to exclude foreign banking corporations from the exception, for they were not the subject of discussion. But the history does tend to explain the exceptions in terms of the considerations of federalism previously mentioned. As this court observed in *In re Union Guarantee & Mortgage Co., supra,* 75 F.2d at 984:

> "The most natural inference is that Congress meant to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise."

We can find no other compelling reason why Congress chose to exempt banks from the benefits of the Act. Even if no statutory scheme for liquidation existed in a particular state, state courts of equity could fill the statutory gap. The distribution of federal-state power was not between a detailed liquidation statute and no statute at all. It was between control by the state, through its courts, of the liquidation of certain quasipublic corporations, and the liquidation of all other corporations through the federal bankruptcy laws.[2]

2. The exception for railroads was doubtless due to the absence from the Bankruptcy Act until 1933 of any provision for reorganization in an industry where liquidation would generally have been considered to be unthinkable because of the public interest in rail transportation, and to the development of the federal equity receivership as an effective mechanism for reorganization.

The District Court concluded in a reasoned opinion, nevertheless, that if Congress intended to exclude from bankruptcy adjudication certain companies for which there was already an extensive regulatory scheme for liquidation, then the liquidation laws and banking laws of foreign countries such as the United Kingdom could serve that objective as well as state schemes could. We think this reasoning elides the essential federalism implicit in the Bankruptcy Act.[3]

It is hardly a cogent argument that a receiver of property may be appointed in a New York State court under § 1202(a)(4) of the New York Business Corporation Law since, if such jurisdiction attached, it would be not because IBB is a "banking corporation," but only because it is a "foreign corporation." And a foreign corporation concededly would be eligible for bankruptcy if it has assets here. The availability of an alternative state remedy is not a good argument for appellees.

This is a case where United States creditors could be harmed if preferential liens were permitted to survive. Despite the speed of communications, the Atlantic Ocean remains as much a barrier to extraterritorial jurisdiction as ever it did. If IBB had been licensed to conduct a banking business in New York and had taken deposits here, it could be argued with some reason that the State of New York, having assumed supervision, should control the liquidation of its assets in New York rather than the Bank-

3. Appellees rely heavily on *Clark* v. *Williard,* 292 U.S. 112 (1934) and 294 U.S. 211 (1935), but this reliance is misplaced. Those cases only held that the full faith and credit clause did not prevent one state from favoring its local levying creditors over a liquidator appointed by another state, insofar as claims to local property were concerned. They were not in any sense an interpretation of the Bankruptcy Act, nor an endorsement of what Justice Cardozo termed "a policy to allow the assets of an insolvent corporation to be torn to pieces at the suit of rival creditors when they could be distributed equally and without sacrifice at the hands of a receiver." 292 U.S. at 123.

ruptcy Court. That is what the New York courts did after the Bolshevik Revolution in the case of Russian insurance companies licensed to do business in New York under the supervision of the Superintendent of Insurance of the State. See, *e.g., Moscow Fire Insurance Co.* v. *Bank of New York & Trust Co.*, 280 N.Y. 286, 299, 20 N.E.2d 758 (1939), *aff'd by an equally divided Court*, 309 U.S. 624 (1940). But IBB was never licensed to do business in New York and was never under the supervision of its Banking Department. There is no statute providing for its liquidation under the aegis of the Superintendent of Banks.

To find IBB to be a "banking corporation" within the meaning of Section 4 would require a "much clearer manifestation of intention than Congress has furnished." *FTC* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 355 (1941) (Frankfurter, J.). Finding no Congressional purpose to command otherwise, we consider IBB not to be a "banking corporation" within the meaning of Section 4a of the Bankruptcy Act. In so doing, we avoid an inequitable result to its creditors, including the other American banks who have lost the race of diligence.

The order dismissing the petition in bankruptcy is reversed.

APPENDIX B

In the Matter of
ISRAEL-BRITISH BANK (LONDON) LIMITED, Bankrupt.

No. 74 Bkcy 1322.

United States District Court,
S. D. New York.
Oct. 10, 1975.

MEMORANDUM

LASKER, *District Judge.*

This bankruptcy appeal raises an issue of first impression, which is of great significance to the international banking community. The economic interdependence among nations and the role of international banking in national and international affairs has evolved dramatically in this century. It is therefore understandable that when Congress in 1898 and 1910 specified in § 4 of the Bankruptcy Act who may and may not be adjudicated a bankrupt, it did not specifically address the question before us: Does the Bankruptcy Court have jurisdiction to entertain a foreign banking corporation's voluntary petition in bankruptcy?

Despite the seeming simplicity of the issue, the question is thorny. As Justice Cardozo shrewdly observed, judicial construction of statutory language presents "a choice between uncertainties." Like Cardozo, "[w]e must be content to choose the lesser." *Burnet* v. *Guggenheim*, 288 U.S. 280, 288, 53 S.Ct. 369, 372, 77 L.Ed. 748 (1933).

I.

The Facts

On September 23, 1974 a voluntary petition in bankruptcy was filed on behalf of Israel British Bank (IBB) and on the same day it was adjudicated a bankrupt.[1] The Bank of the Commonwealth (Commonwealth) and the Federal Deposit Insurance Corporation (FDIC) as successor in interest to Franklin National Bank (Franklin) appeal from the decision or the Bankruptcy Court which denied Franklin's motion to dismiss IBB's petition and sustained the court's jurisdiction over IBB.

IBB is a corporation organized under the laws of the United Kingdom and formerly engaged in banking business with its principal place of business in London. It has never had a place of business, office or agent in the United States; has never been qualified to do business here; and never has done business in this country as a bank. IBB's property in this judicial district consists of deposits in various banks totaling several million dollars. On August 2, 1974, IBB filed a debtor's petition in Great Britain for the winding up of its affairs. Approximately four days later a Provisional Liquidator was appointed to safeguard the bank's property, and on December 2, 1974, the High Court, Chancery Division, of the United Kingdom approved IBB's petition and ordered the winding up of its affairs.

Appellants, FDIC and Commonwealth, are lien creditors of IBB in the amounts of $2,000,000. and $500,000. respectively. Both liens were perfected within four months of the filing of IBB's petition here. Consequently, if IBB is adjudicated a bankrupt under the Bankruptcy Act, a trustee in bankruptcy has the power to void those liens pursuant to § 67(a) of the Act, 11 U.S.C. § 107(a).

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1. An amended petition, dated October 1, 1974, was filed on October 10, 1974. The parties have stipulated that this appeal be deemed addressed to the amended, as well as original petition.

II.

The Statute

Section 4 of the present Bankruptcy Act, 11 U.S.C. § 22, provides in relevant part:

"§ 22. Who may become bankrupts

> (a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a *voluntary bankrupt*.
>
> (b) Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, excepting a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an *involuntary bankrupt* upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this title." (Emphasis added).

According to § 4(a), any person can file a petition as a voluntary petition except certain corporations, including "banking corporations." If IBB falls within the definition of "banking corporations" it may not file a petition; conversely, if the exception does not apply, it may enjoy the benefits of the Act.

In the decision below, Judge Galgay concluded that as a matter of law the term "banking corporation" in § 4(a) does not encompass foreign banks which have no business connection with the United States other than the location of assets here, and that the scope of the exception covers only "national banking corporations and banking corporations created under state and territorial laws." He held that IBB fell outside the scope of the exceptions to § 4(a) and accordingly could be adjudicated a voluntary bankrupt.

Contrary to the position adopted by the Bankruptcy Court and urged by IBB, FDIC and Commonwealth argue

that (1) the legislative history of the Act fails to support the limitation of the exception to domestic banking corporations; (2) application of the exclusion to foreign banks does not frustrate the purposes underlying the "banking corporation" exception; and (3) the court is without power to modify an unqualified exception for "banking corporations" to cover only domestic banks.

III.

The Ambiguity of a Clear Statute

Although the parties devote considerable attention in their briefs to the legislative history of § 4, each side asserts that a mere reading of the statute immediately compels judgment in its favor.

Quite simply, IBB argues that while it was undeniably a bank in Great Britain, it was also quite definitely not a "bank" as such anywhere in the United States, and therefore does not fall within the "banking corporation" exception of § 4(a). The argument does not wash. There is no provision in the Act which states that a foreign corporation must *operate* as a bank within the United States in order either to enjoy the benefits of bankruptcy or to fit within the Act's exceptions, and of course the courts cannot write such a requirement into the Act. The corporations listed in § 4(a)—both those that may be adjudged a bankrupt and those that may not—are described only with reference to the character of the entities, not to the extent, if any, of actual operation. It would be one thing if IBB had never operated as a bank anywhere. But since its corporate activities have indisputedly been in general those of a bank, it cannot avoid being so defined.

Another section of the Bankruptcy Act highlights the fact that the actual business of a corporation in the United

States is unimportant for jurisdictional purposes. According to § 2 of the Act, the Bankruptcy Court has jurisdiction as a general matter over foreign persons and corporations solely on the basis of their having property located in the United States. 11 U.S.C. § 11a(1). The presence of assets —not the corporate activities within this county—is the predicate for jurisdiction over foreign corporations.[2] Indeed, a foreign bank which does extensive banking business within this country is nevertheless subject to bankruptcy adjudication solely on the basis of its assets here if its principal place of business is outside the United States. 11 U.S.C. § 11a(1). There is no authority for IBB's contention and we decline to adopt it.

There is greater appeal in the position of FDIC and Commonwealth that because the term "banking corporations" does not on its face admit of the refinement sought by IBB, no such restriction is permissible except by Congressional amendment.

Reference to the definitional section of the Act is necessary to understand appellant's position. The word "person" is defined in § 1(23) of the Act to include corporations; § 1(8) defines "corporations" to include:

> ". . . all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association . . ."

Thus, the Act allows any corporation including foreign corporations with assets in the United States to file a petition in voluntary bankruptcy except for certain categories of

2. The dispute as to whether § 2(a)(1) is a jurisdictional or venue statute (see, e. g., *Bass v. Hutchins*, 417 F.2d 692 (5th Cir. 1969); *In re Eatherton*, 271 F.2d 199 (8th Cir. 1959)) is irrelevant to the issue at hand because the predicate of jurisdiction if any, in this case is § 4.

corporations, including banking corporations. The term "banking corporation" has been sensibly construed to include "corporations which were authorized by the laws of their creation to do a banking business." *Gamble* v. *Daniel,* 39 F.2d 447, 450 (8th Cir.), *appeal dismissed,* 281 U.S. 705, 50 S. Ct. 464, 74 L.Ed. 1129 (1930). FDIC and Commonwealth argue that a mere reading of § 4(a), together with §§ 1(23) and 1(8) ineluctably lead to the conclusion that a bank such as IBB, authorized under the laws of the United Kingdom to conduct a banking business, squarely falls within the meaning of "banking corporation." According to appellants, the clarity of the statute precludes the need or justification to search elsewhere for a guide to its effect in the case of foreign banks.

IV.

Legislative History

A. A Note on the Propriety of Consulting Legislative History

Despite the admonition by FDIC and Commonwealth that resort to legislative history is unwarranted, courts have not been chary to consider that history if it illuminates even superficially "clear" statutory language. See, e.g., *Lynch v. Overholser,* 369 U.S. 705, 710, 82 S.Ct. 1063, 8 L.Ed.2d 211 (1962); *United States v. American Trucking Associations,* 310 U.S. 534, 543, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940); *Knapp v. McFarland,* 462 F.2d 935 939 (2d Cir. 1972); *Guiseppi v. Walling,* 144 F.2d 608, 624 (2d Cir. 1944) *aff'd sub nom., Gemsco, Inc. v. Walling,* 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945); *but see, e.g., Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 395-97, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (concurring opinion) (Jackson, J.); Radin, "Statutory Interpretation," 43 Harv.

L. Rev. 863 (1930) and Landis, "A Note on 'Statutory Interpretation'," *id.* at 886. While the words of a statute are of course the primary tool in divining legislative intent, judicial interpretation is not straitjacketed by those words if the legislative history evidences a purpose or objective at odds with a plain reading of the statute.

> "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States,* 278 U.S. 41, 48, 49 S.Ct. 52, 54, 73 L.Ed. 170 (1928).

In any event, the debate in this case is largely one of academic interest for a review of the history of § 4 reveals, if nothing else, one stark conclusion: Congress has never considered whether foreign banks are to be treated differently than domestic ones.

B. The History of Section 4

1. The Bankruptcy Act of 1898[3]

Section 4 of the Bankruptcy Act of 1898 (Public Law 171, 55th Congress, 30 Stat. at L. 544, chap. 541), the original predecessor of the present law, provided:

> "Sec. 4. Who May Become Bankrupts.—(a) Any person who owes debts, except a corporation, shall

3. The history of § 4 prior to 1898 may be summarized briefly. Under the Act of 1800 (which was repealed in 1803 (2 Stat. 248)) bankers resident within the United States could be adjudicated involuntary bankrupts, § 1 (2 Stat. 19). The Act made no proviison for voluntary bankruptcy. The next bankruptcy act which was passed in 1841 and repealed two years later, provided in § 1 that resident banks could be adjudged both voluntary and involuntary bankrupts. The most immediate predecessor to the 1898 Act was the Bankruptcy Act of 1867, which also provided that resident banks and bankers, whether incorporated or not, were subject to both voluntary and involuntary adjudication. §§ 3, 9, 11. The Act was repealed in 1878.

be entitled to the benefits of this Act as a voluntary bankrupt.

(b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial Laws, may be adjudged involuntary bankrupts."

The act excluded all corporations from becoming voluntary bankrupts. While permitting certain business corporations to be adjudged involuntary bankrupts, the last sentence in § 4(b) excluded even from that category "national banks or banks incorporated under State or Territorial Laws."

As originally proposed, § 4(b) specifically excluded only "national" banks. As the following excerpts from the legislative history disclose, the reason for the exclusion was the existence of other more effective insolvency laws and procedures. The proponent of the bill in the Senate, Senator William Lindsay, explained:

> "There is a law now in force for the control and regulation of national banks, and it was thought best not to interfere with that law. In certain contingencies the government is responsible for the assets of such banks, and it is but reasonable that it should have entire control of them and of their liquidation in cases of dishonesty or insolvency." 30 Cong. Rec. 602, 55th Cong., 1st Sess. (1897).
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> • • •
>
> "There is already in existence a satisfactory law for the control and liquidation of national banks. Since the Government is responsible for the bank notes issued by these banks in the event of their failure, there is good reason why it should have control of their liquidation." 30 Cong. Rec. 606, 55th Cong., 1st Sess. (1897).

The House Judiciary Committee Report, House Report No. 65, 55th Cong., 2d Sess. (1897) also noted the existence of other insolvency provisions as a reason for excluding national banks:

> "The bill exempts national banks from being proceeded against in bankruptcy, for the reason that Congress has legislated especially in respect to them, and the most careful provisions exist for protecting all interests connected by the national banking laws." *Id.* at 40.

During the debate on the House Floor, Congressman Robert N. Bodine criticized the sweeping scope of § 4(b) and predicted problems which would result if publicly regulated corporations other than national banks were not also excluded:

> "This bill is the first one of its kind to include corporations at all . . . It may be that there is a certain class of corporations that are as appropriately made subject to its provisions as are natural persons [such as those who] engage in any business of the same kind as that usually carried on by individuals. But, this bill goes much further than this. It embraces insurance companies, both fire and life, stock, mutual, assessment, or benevolent; it embraces building and loan associations, trust companies, savings banks, and all other State banks.
>
> "Now, in nearly every State in the Union there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings in case of the insolvency of any of those classes of corporation. . .
>
> "By this bill, at one fell swoop, all the jurisdiction of the several States as to these matters is taken away and vested in the trustee in bankruptcy, and the duties imposed by the State itself upon the officer

of the bankrupt court, to be performed, no doubt, at an expense many fold greater; and if the experience of the past is any criterion, the creditors, the beneficiaries, or depositors, as the case may be, will receive but a pittance, and the funds to which they are equitably entitled will go into the pockets of the court officials.

"Under this bill a trustee in bankruptcy becomes the insurance commissioner, the railroad commissioner, the bank examiner and commissioner and the building and loan commissioner of the several States . . . Heretofore the Federal courts have confined themselves principally to carry on the business of the great railroads of the country; but now it is proposed to enlarge their business, to make them vast department stores, in which everything can be bought and every business conducted, from a railroad down to a peanut stand." 31 Cong. Rec. 1939, 55th Cong., 2d Sess. (1898).

Despite Congressman Bodine's fears, the House passed the bill as reported by the House Judiciary Committee. At the request of the Senate, the bill was referred to a Conference Committee, which added the following sentence to § 4(b):

> "Private bankers, but not national banks or banks incorporated under State or Territorial Laws, may be adjudged involuntary bankrupts."

No explanation for the additional sentence was given by the Committee except for the unilluminating statement that:

> "The great railroad and transportation companies and banks incorporated under any law are left to be dealt with by the laws of the State creating them. It would lead to much confusion and hardship and many complications should we undertake to subject the great railroad and transportation corporations to the provisions of this act. It is believed that they can be better dealt with under other laws." 31 Cong. Rec. 6426 55th Cong., 2d Sess. (1898).

2. Amendments of 1903 and 1910

While Congress amended § 4(b) in 1903, the exclusion of "private bankers . . ." remained unchanged.[4]

However, Congress substantially revised § 4 in 1910. As amended, the section provided:

> "Sec. 4. Who may become bankrupts.—(a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.
>
> (b) Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act.
>
> "The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States." (Public Law 294, 61st Congress, 36 Stat. at L. 838, chap. 412).

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4. Section 4(b) as amended in 1903 (Public Law 62, 57th Congress, 32 Stat.L. 797, Chap. 487) provided:

> "(b) Any natural person, except a wage-earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, [mining] or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.
>
> [The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory or of the United States.]" (Additions made by 1903 amendment in brackets).

Under the 1898 Act, no corporation had been eligible to file a voluntary petition. Under the 1910 Act all corporations, except municipal, railroad, insurance or banking corporations, were authorized to do so. Section 4(b) in the 1898 version as amended in 1903 had subjected "any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits" to involuntary bankruptcy. The 1910 amendment instead allowed "any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation" to be adjudged an involuntary bankrupt. Moreover, the provision of the 1898 Act which had provided that "[p]rivate bankers, but not national banks or banks incorporated under State or Territorial Laws" could be adjudicated involuntary bankrupts was deleted.

According to statements made during the floor debate by Congressman Sherley, sponsor of both amendments to § 4, the revision in § 4(b) was intended to clarify what types of corporations could be adjudicated involuntary bankrupts by formulating a comprehensive definition with certain exceptions rather than by enumeration, as in the 1898 Act, of the specific categories of corporations subject to involuntary bankruptcy.

At the hearing before the House subcommittee which considered the amendments, Congressman Sherley referred to those corporations which were excluded by § 4(b) and stated:

> "There has been excepted out of the law always certain corporations—for instance, municipal, railroad, insurance, or banking corporations—on the theory that all of those corporations partook either of a public or quasipublic nature that did not warrant their estates being adjudicated through bankruptcy proceedings, and that it was wiser to hold them exempt from the law than to permit them to be thrown into bankruptcy by either voluntary or

> involuntary proceedings. This amendment does not, in that particular, change the law at all. Now these particular corporations are exempted. What is here proposed is to permit the voluntary filing of a petition by a corporation." Hearing before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 18694 (bankruptcy), Feb. 3, 1909.

In its report on the proposed 1910 amendments, the House Committee on the Judiciary wrote:

> "The words substituted are taken from the bankruptcy law of 1867, and their meaning has long since been settled by the courts. The reason for exempting the quasipublic corporations will be apparent. Banks are excepted from the operation of the law at present. Other business entities having similar responsibilities to the public are now also excepted." House Report 511 (61st Congress, 2d Session) (1910) at 5.

3. The 1932 Amendment [5]

In 1932 building and loan associations were added to the list of corporations excepted from the provisions for voluntary and involuntary bankruptcy. In recommending the bill to the House, the House Judiciary Committee wrote:

> "The purpose of the bill is to exempt building and loan associations from the operation of the national bankruptcy law. When the national bankruptcy law was drafted it was thought wise to exempt from its operation municipal, railroad, insurance, and banking corporations. At that time building and loan associations were not as extensive and through oversight or otherwise these associations were not included in the exemption. Every reason which obtains for exempting the corporations above re-

5. Congress revised the Bankruptcy Act in 1938 and, at that time made certain changes in § 4(b), but none of them were addressed to the "banking corporation" exception.

ferred to obtains in so far as building and loan associations are concerned. . . . It has been suggested that by reason of the fact that in two States in the Union no law exists controlling building and loan associations that this might be a reason for not exempting these associations from the operation of the bankruptcy law. It will be remembered that if the bankruptcy law is not invoked in connection with building and loan associations that this in no way interferes with the State equity laws and whether a State has supervisory control over building and loan associations or not those interested may at all times take advantage of State insolvency laws." House Rep. 98 (72nd Congress, 1st Sess. 1932).

V.

The Import of the History

In sum, the exception for "banking corporations" from the benefits of voluntary bankruptcy was first enacted in those words in 1910, but the policy of excluding banks from aspects of the Act was earlier conceived in the 1898 version of § 4(b). However, unlike the 1898 statute, which expressly accepted national, state or territorial banks from involuntary bankruptcy, the 1910 amendment eliminated any reference to a bank's place of incorporation. To prevail, IBB must therefore demonstrate that, despite the change in language, Congress intended the jurisdictional rule of the earlier statute to survive the 1910 revision. IBB relies on two sources to support this construction: the views of members of Congress and the policies underlying the exception as evidenced in legislative history and as construed by courts.

Specifically, IBB relies upon the statements made by Congressman Bodine in 1898 (see *supra* at [pp. 11-b–13-b]) and Congressman Sherley in 1909 (see *supra* at pp. [12-b–13-b]) as evidence that (1) Congress exempted only national, state and territorial but not foreign banks from involuntary

bankruptcy in 1898; and (2) Congress did not intend the exception to be expanded in 1910 to cover foreign banks. FDIC and Commonwealth object at the outset to giving weight to these statements because the case at hand involves a voluntary petition, and the congressional remarks in question were not addressed to § 4(a) which relates to voluntary bankrupts. In addition, they argue that the phrase "national banks and banks incorporated under State or Territorial Laws" in § 4(b) of the 1898 Act never modified the exception for "banking corporations" in § 4(a) of that statute. FDIC and Commonwealth consequently argue that the history of and reason for the specific reference to national, state and territorial banks in the exceptions to involuntary bankruptcy is only tangentially relevant to the construction of the banking exception for voluntary bankruptcy.

Although the history outlined above is correctly stated, we disagree with the conclusion that appellants draw from it. The exception in the present Act for "banking corporations" is identical in §§ 4(a) and (b). Whatever the helpfulness of maxims of construction in general, common sense dictates that the same words used in different parts of the same statutory provision should, absent evidence to the contrary, be accorded the same meaning. See *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 149-159, 64 S.Ct. 474, 88 L.Ed. 635 (1944). Therefore, if the exception in § 4(b) only covers national, state and territorial banks, that fact is relevant to the determination whether foreign banks are covered under § 4(a).

A. Congressman Bodine's Fears

IBB first points to the statement in 1898 of Congressman Bodine advocating the exclusion of "trust companies, savings banks, and all other State banks" from § 4(b) to avoid interference with state regulation of these institutions. (see *supra* at pp. [11-b–13-b]) IBB argues that Con-

gressman Bodine's comments evidence a concern only that state, as distinct from foreign, banks be excluded from the Act and that he was unconcerned with the question whether foreign banks could be adjudicated involuntary bankrupts. According to IBB, when the Conference Committee added the phrase excluding state or territorial banks to § 4(b), it "apparently accepted Congressman Bodine's position." (IBB Memorandum at p. 24) IBB concludes from this that Congress did not mean to exclude foreign banks.

We do not draw the same conclusion. For one thing, because the Congressman did not consider foreign banks at all, his statements shed no light on the issue. Moreover, it is not even clear that Congressman Bodine's attitude towards state banks was accepted by Congress as a whole. As Dean Sovern has pointed out in "Section 4 of the Bankruptcy Act: The Excluded Corporations,"

> ". . . It might be argued that Congress left the insolvency administration of banking and insurance corporations and building and loan associations to state law for the reasons suggested by Mr. Bodine, that '[I]n nearly every State in the Union there are chapters on chapters of the statutes regulating to the smallest minutia the proceedings in case of the insolvency of any of those classes of corporations.' . . . *The argument suffers badly from the lack of evidence in the history of section 4 that the rest of Congress shared Mr. Bodine's views.*" 42 Minn.Law 171.180 (1957) (emphasis added).

Moreover, Congressman Bodine was neither the sponsor of the 1898 Act in the House nor a member of the committee which drafted the legislation. There is no reason to view the statement as other than to view the statement as other than he view of one Congressman.[6]

6. The Supreme Court and commentators have suggested that expression in debate by individual legislators (other than the member in charge of the bill) should be disregarded. See *United States*

B. The Import of Congressman Sherley's Statement

IBB place great emphasis on Congressman Sherley's statement that the 1910 amendment to § 4(b) did not "change the law [regarding excepted corporations] at all" as "crucial evidence" that Congress implicitly deemed the term "banking corporations" to include only national, state or territorial banks. (see *supra,* pp. [12-b–13-b]).

However, even assuming that IBB interprets Congressman Sherley's statement correctly to mean that the exception in the 1910 Act was intended to have the identical effect of its 1898 predecessor, this view is beneficial to IBB's position only if the effect of the 1898 exception was itself limited to national, state and territorial banks. Unfortunately, a close analysis of that Act does not produce a clear cut answer.

We start with the language of § 4(b) of the 1898 Act which specifies what entities can be adjudicated involuntary bankrupts. *Un*incorporated companies could be adjudged involuntary bankrupts regardless of the nature of their businesses. However, in the case of corporations, only those "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits" fell in that category, and of course, even IBB does not suggest that banks are principally engaged in manufacturing, printing or publishing. Although Congress did not define the terms "trading" or "mercantile pursuits," IBB does not contend that banks operate in those fields and, indeed, the decisions in *Zugalla* v. *International Mercantile Agency,* 142 F. 927 (3d Cir. 1906), *In re Surety Guarantee & Trust Co.,* 121 F. 73 (7th Cir. 1902), and *In re New York & W. Water Co.,* 98 F. 711 (S.D.N.Y.) *aff'd* 102 F. 1004 (2d Cir. 1900) are

v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 318, 17 S.Ct. 540, 41 L.Ed. 1007 (1897); Ten Broock, "Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court," 25 Calif.L.Rev. 326 (1937). Even if the rule is more honored in the breach, the caution it counsels is wise.

consistent with the view that they did not.[7] Thus, it is plain that no banking corporation could be adjudged an involuntary bankrupt under the 1898 Act (see *Murphy* v. *Penniman,* 105 Md. 453, 469, 66 A. 282 (1907)) unless, as IBB argues, the *exclusionary* language of § 4(b) in 1898 leads to a different conclusion.

One is therefore left to grapple as at the outset with the meaning of the last sentence of § 4(b) of the 1898 Act:

> "Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts."

If the analysis above as to the *inclusionary* language in § 4(b) is correct, this final sentence is rendered mere surplusage. Interpretations offered by each side as to the reason for its inclusion do not detract from the persuasiveness of this view, for if all banks were outside the scope of the *inclusionary* language of § 4(b), specification of only certain types of banks in the *exclusionary* language of the section adds nothing to the effect of the statute.

The question ought not be settled on such an uncertain basis, if any firmer ground exists. Moreover, we are loath

7. See also *In re New York Building-Loan Banking Co.,* 127 F. 471 (S.D.N.Y. 1904) where the court held that because the debtor did not fit within the enumerated classes of included corporations it was not subject to the Act, and stated:

> "The authorities under the present act seem decisive. They hold, in substance, that the intention of the present bankrupt act, the provisions of which are much more restrictive than those of the earlier bankrupt acts, was to exclude from the operation of the act banks, railroad, telegraph and express companies, and all corporations except those mentioned in the act. By the provisions of the present act the corporations which can be put into involuntary bankruptcy are those 'engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits.' These terms are to be taken in their natural and usual meaning, and any corporation which does not come within such meaning cannot be put into bankruptcy. I think that an ordinary building and loan association is not a corporation which is included in the provision quoted." 127 F. at 471-72.

to decide a case as important as this on whatever conclusions IBB would have us draw from an isolated comment made by a single Congressman, even one who sponsored the bill.[8] Furthermore, we note the irony of IBB's position which depends on that portion of § 4(b) which specifies who may *not* be adjudged an involuntary bankrupt in order to demonstrate who *may*. Such an analysis is especially weak where, as here, so little meaningful history is to be found. IBB argues that non-inclusion in an exclusion results in inclusion. That is, it contends that the failure to include foreign banks in the sentence which excludes national, state and territorial banks results in the determination that foreign banks are among the types of corporations who may be adjudged involuntary bankrupts. But this syllogism runs crashing into the hard, clear language of the coverage clause of § 4(b) which simply does *not* authorize the involuntary bankruptcy of a bank.

The plain fact is that the legislative history offers no clue why Congress inserted the limitation as to national, state and territorial banks, and appellants' suggestion that the phrase is mere surplusage is no more than an educated guess.

In sum, none of the theories urged by either side obviates the fact that there is no indication that Congress, either in 1898 or 1910, considered the effect of the exception as to foreign banks. We therefore proceed to consider the policies underlying the exception to determine whether its application to foreign banks would further or would thwart the objectives of the statute.

8. Unlike Congressman Bodine in 1898, Congressman Sherley was the sponsor of the 1910 bill in the House and his statements should not "be dismissed out of hand" as ones reflecting only his view. *United States* v. *Enmons,* 410 U.S. 396, 405 n. 14, 93 S.Ct. 1007, 35 L.Ed.2d 379 (1973). However, the teaching of Justice Frankfurter that judges "not delve into the mind of legislators or their draftsmen, or committee members" is nevertheless apt. Frankfurter, "Some Reflections on the Reading of Statutes," Col. L. Rev. 527, 539 (1947).

VI.

The Purposes of the Exception

A. Existence of Alternate Regulation

A variety of courts which have considered the exceptions to § 4 of the 1910 Act have concluded that Congress excepted railroads, municipal, insurance and banking corporations because of the existence of pervasive state regulations over these activities.

For example, as the court in *Woolsey et al.* v. *Security Trust Co.,* stated:

> "The letter of that section excludes banking and insurance corporations; its spirit and purpose, to leave the liquidation or the banking corporations of the country to the well-organized departments of the states and the nation organized for the purpose of supervising while they are going concerns and of liquidating them when they are not, excludes them. *Federal laws provide elaborately for the supervision and liquidation of national banking corporations; the laws of the states do the same for state banks and insurance companies, in order to protect the millions of persons who deal with them on the faith of the protection afforded by direct governmental supervision and control.* It was considered that it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings, and it was intended, by withdrawing jurisdiction over these corporations from the bankruptcy court, that this would not occur. It would be directly contrary to the purposes so definitely and comprehensively expressed, to exempt banking corporations from the act, leaving their administration and liquidation to the state and federal systems devised expressly for them, to hold that this bank and trust company is not exempt, chartered though it was under the state banking

> laws, with banking privileges and powers, operated though it was under those laws, and now being liquidated, as it is, under them." 74 F.2d 334, 337 (5th Cir. 1934). (Emphasis added).

Although the Court of Appeals for this Circuit admitted in *Union Guaranty & Mortgage Co. v. Van Schaick, Supt. of Ins.,* 75 F.2d 984 (2d Cir. 1935) that "The purpose of the exception is not self evident; we must infer it as best we can from such similarity as exists between the excepted groups," it nevertheless observed that:

> "The most natural inference is that Congress meant to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise." *Id.*

And in *In re Island Mortgaging Corp.,* 18 F.Supp. 448, 449 (E.D.N.Y.1935), the court remarked:

> "Congress has seen fit to exclude from the operation of the Bankruptcy Act certain types of corporations which, because of their quasi public nature, were assumed to belong wholly under state supervision and control."

As recently as April of this year, the district court in *In re Equity Funding Corp. of America* considered the exception for insurance companies and analyzed the Congressional purpose in excluding insurance companies in terms logically applicable to banking corporations:

> "Congress in enacting Section 4 decided that liquidation of insurance companies should be left to the states. *In Re Union Guarantee & Mortgage Co.,* 75 F.2d 984 (2d Cir. 1935); *In Re Supreme Lodge of the Masons Annuity,* 286 F. 180, 184 (N.D.Ga.1923). Since the reorganization of an insurance company or its adjudication as a bankrupt under the Act would

preempt state liquidation proceedings for that company, Congress enacted Section 4 to preserve the exclusive jurisdiction of the states over the liquidation of insurance companies and to prevent the reorganization of insurance companies or their adjudication as bankrupts. *See Woolsey v. Security Trust Co.*, 74 F.2d 334, 337 (5th Cir. 1934).

By preserving state liquidation proceedings, Congress sought to prevent bankruptcy or reoganization courts from interfering with comprehensive state insurance regulations with the rights of those insured protected by such regulations. *See In Re Union Guarantee & Mortgage Co., supra; In re Superior Lodge of the Masons Annuity, supra.* As the language of Section 4 suggests, Congress determined that interference with state insurance regulations would not occur as long as bankruptcy courts did not reorganize insurance companies or adjudge them to be bankrupts." 396 F.Supp. 1266 at 1275 (C.D.Cal. April 11, 1975).

See, in general, C. Seligson and L. King, "Jurisdiction and Venue in Bankruptcy", 36 *Journal of the National Assoc. of Referees in Bankruptcy,* 38.

Comments by Congressman Bodine (see *supra,* at pp. [11-b–13-b]) and other legislators during debate on the 1898 Act support the view that Congress considered the existence of alternative regulatory mechanisms a reason for excluding national, if not state and territorial banks. See, *e.g.*, 30 Cong. Rec. 606 (1897). However, as Dean Sovern has noted, while "[t]here is slight support in the deliberation preceding the passage of the Act in 1898, and in the debate preceding the exemption of building and loan associations [for the theory that Congress excepted the corporations because of alternate state regulation]", there is

> "[H]ardly enough to sustain the proposition that Congress excluded banks, insurance corporations and building and loan associations primarily because

> they were so extensively regulated by the states. The argument suffers, too, from Congress' failure to exclude all closely regulated enterprises from bankruptcy." 42 Minn.L.Rev. *supra* at p. 180.

Moreover, if a desire to bequeath the regulation of banks to the states was one of Congress' objectives, the statutory scheme did not consistently achieve that result because in 1898 not every state or territory had enacted laws for the control and liquidation of banks. (*E.g.*, Texas, see Gen.L. Tex. 1st Sess. Ch. 10 (1905); Washington, see Washington Code Ann. Title 41 (1912)). Indeed, some courts held that the absence of a state regulatory mechanism was irrelevant. For example, in *In re Oregon Trust & Savings Bank,* the court noted:

> "Under the statutes of the state of Oregon provisions are made for forming corporations, and by virtue of such laws, therefore, corporations might be and are frequently formed for carrying on a banking business. The organization of banks, therefore, comes within the purview of the statutes, and *it does not seem to me that it makes any difference as to the effect of the law that no particular laws were made until recently for the regulation of banks organized under the laws of the state.* The banks are, nevertheless, organized for the purpose of carrying on a banking business, and hence such corporations come within the intendment of that clause of the bankruptcy act which has been theretofore alluded to, and therefore are not subject to be adjudged involuntary bankrupts." 156 F. 319, 320 (D. Or. 1907). (emphasis added).

Further support for the view that Congress did not regard alternative regulation as the *raison d'etre* for the exceptions is found in the language of the House Report on the 1932 amendment which added building and loan associations to the list of excepted corporations:

> "This legislation is sponsored by the United States Building and Loan League, and so far as the committee has been able to ascertain no one connected with building and loan associations opposes this legislation. However, it has been suggested that by reason of the fact that in two States in the Union no law exists controlling building and loan associations that this might be a reason for not exempting these associations from the operation of the bankruptcy law. It will be remembered that if the bankruptcy law is not invoked in connection with building and loan associations that this in no way interferes with the State equity laws and whether a State has supervisory control over building and loan associations or not those interested may at all times take advantage of state insolvency laws." (House Report 98, 72d Cong., 1st Sess. 1932)

If state regulation was indeed the motivation behind the banking corporation exception, then Congress was inconsistent in permitting private bankers to be adjudicated involuntary bankrupts in 1898, since allowing such an adjudication did in fact interfere with state regulation. In *In re Salmon & Salmon*, 143 F. 395 (W.D.Mo.1906) the court refused to give effect to state laws governing the winding up of a private bank owned by a partnership on the grounds that the operation of the state statute was preempted by the Bankruptcy Act. See also *In re Faour*, 72 F.2d 719 (2d Cir.), *cert. denied*, 293 U.S. 613, 55 S.Ct. 143, 79 L.Ed. 703 (1934); *In re Bajardi*, 9 F.2d 797 (2d Cir.), *cert. denied*, 270 U.S. 651, 46 S.Ct. 351, 70 L.Ed. 781 (1926); *accord*, *State of Missouri v. Angle*, 236 F. 644 (8th Cir. 1916).[9]

Furthermore, if Congress intended to exclude from bankruptcy adjudication certain companies for which there was

9. There was a similar interference with state regulatory schemes in the insurance area prior to the 1938 deletion of "any unincorporated company" from Section 4b. *See Republic Underwriters v. Ford*, 100 F.2d 511 (5th Cir. 1938); *In re Minnesota Insurance Underwriters*, 36 F.2d 371 (D.Minn. 1929).

already an extensive regulatory scheme for liquidation, the liquidation laws and banking laws of foreign countries such as the United Kingdom could serve that objective as easily as state schemes.

In any event, appellants argue that New York[10] has enacted ample statutory provisions to cover bankrupts such as IBB. They point out that foreign banks doing business in New York are subject to the regulations of state authorities. *E.g.*, N. Y. Banking Law § 200 *et seq.* If these banks become insolvent, liquidation proceedings may be pursued and a state official may acquire possession of the bank's business for the protection of creditors. *E.g.*, N. Y. Banking Law § 605 *et seq.* IBB responds that these statutes are ineffective as to it because it never carried on banking business here. In such a situation, formal liquidation proceedings may not be authorized by statute, but New York Business Corporation Law § 1202(a)(4) provides that a receiver of the property of the corporation can be appointed by the court in the following situation, which presumably applies to IBB:[11]

> "An action to preserve the assets in this state, of any kind, tangible or intangible, of a foreign corporation which has been dissolved, nationalized or its authority or existence otherwise terminated or cancelled in the jurisdiction of its incorporation or

10. Appellant did not cite statutes of other states although they contend that the liquidation of IBB would be supervised by the laws of other states as well.

11. Section 1202(a)(4) of the Business Corporation Law and its predecessor have been applied to foreign banks with assets in New York. See, *e.g.*, *Stephen v. Zivnostenka Banks*, 31 Misc.2d 10, 155 N.Y.S.2d 340 (1956), *aff'd* 2 A.D.2d 958, 157 N.Y.S.2d 903, *aff'd*, 2 A.D.2d 958 157 N.Y.S.2d 904, *aff'd*, 3 N.Y.2d 862, 166 N.Y.S.2d 309, 145 N.E.2d 24 (1957), *appeal dismissed*, 356 U.S. 22, 78 S.Ct. 560, 2 L.Ed.2d 578 (foreign bank had been nationalized); *Augstein* v. *Banksa A. Hutui Akciova Spolecnost*, 124 N.Y.S.2d 446, *modified on other grounds*, 282 *App. Div.* 929, 125 N.Y.S.2d 647 (1963); (foreign bank had been nationalized).

> which has ceased to do business, brought by any creditor or shareholder of such corporation or by one on whose behalf an order of attachment against the property of such corporation has been issued."

B. Other Objectives Underlying the Banking Exception

Purposes other than that of alternative state regulation have been suggested as prompting the enactment of the banking corporation exception. In holding that a fraternal organization was not subject to the Act as an insurance corporation, the court in *In re Supreme Lodge of the Mason's Annuity* stated that while "No reasons for making these exceptions [for municipal, railroad, insurance or banking corporations] were assigned by the committees of Congress," three reasons other than that of alternate state regulation "might be surmised":

> (1) "the public or quasi public nature of the business, involving other interests than those of creditors";
>
> (2) "the desirability of unarrested operation"; and
>
> (3) "the inappropriateness of the bankruptcy machinery to their affairs." 286 F. 180, 184 (N.Ga. 1934).

Remarks by Congressman Sherley and statements in the 1910 House Judiciary Report (*supra* at pp. [12-b–13-b]) support the theory that the quasi-public nature of the exceptions was a common basis of their enactment. As the Second Circuit has noted:

> "All except municipalities are companies for profit whose businesses are now generally regarded as 'affected with a public interest'; that is to say, as touching enough persons who must deal with them at some economic disadvantage, to require public supervision and control." *Union Guaranty & Mtge Co. v. Van Schaick, supra,* 75 F.2d at 984.

Accord, In re Island Mortgaging Corp., supra; In re National Mortgage Corporation, 17 F.Supp. 54, 55 (D.N.J. 1935); *In re Prudence Co., Inc.,* 10 F.Supp. 33, 39 (E.D.N.Y.) *aff'd,* 79 F.2d 77 (2d Cir.), *cert. denied sub nom. Egbert v. Callaghan,* 296 U.S. 646, 56 S.Ct. 247, 80 L.Ed. 459 (1935); see *In re Equity Funding Corp. of America, supra; Columbia Ry. Gas & Elec. Co. v. South Carolina,* 27 F.2d 52, 55 (4th Cir. 1928).

It is true that in the case of each type of excluded corporation, Congress might well have determined, first, that social and economic interests deserved greater consideration than the interest of equality of distribution among creditors that the Bankruptcy Act in general seeks to achieve; and second, that regulation by states was more appropriate. But if Congress understood the importance of maintaining confidence and stability in the banking system, that concern does not logically demand the creation of a distinction between domestic and foreign banks, given the existence of alternate schemes of regulation of foreign banks by other countries such as here, the United Kingdom.

Turning to the next suggested objective—the desirability of unarrested operation in order to maintain confidence in the institution and in the economy in general—it is logical that Congress might have desired to avoid closing a major bank upon its becoming insolvent if there was any practical way to transfer the banking business of that corporation to a solvent corporation without cessation of operation. The recent memory of the bankruptcy of Franklin National Bank is testimony that such a consideration is of continuing importance. However, no reason suggests itself why the same consideration would not be of equal significance in the case of a foreign bank with assets, creditors or depositors here.

As to the last purpose enumerated by the court in *In re Supreme Lodge,* that is, that the bankruptcy machinery is

inappropriate to winding up the affairs of a bank, the argument applies with equal force both to domestic and foreign banks. Moreover, if the process of bankruptcy under the Act is ill suited for winding up of the affairs of a bank with a large number of creditors, neither in 1898 nor in 1910 did Congress view this problem as a stumbling block in the case of private banks, which might have as many creditors as corporate banks but which could nevertheless be adjudged involuntary bankrupts in 1898.

We conclude that there is nothing inherent in the probable objectives of Congress which requires or suggests that the exclusion of "banking corporations" from the coverage of the Act should apply to domestic but not foreign banks.[12]

VII.

Equitable Considerations

IBB argues that in view of Congress' failure to give the slightest consideration to foreign banks and the dearth of authority to support the position of either side, § 4 should be construed to achieve the "equitable" objectives of the

12. Nor do we find any basis for distinguishing between banking corporations which are actively engaged in banking and those which are not. Even if it may be argued that the objectives of deferring to state regulation, or maintaining the continuity of operations of a bank are more clearly applicable to corporations actively engaged as banks then those which are not, the Act simply makes no such distinction as to domestic banks.

Perhaps all that a sustained effort to find the "meaning" of the statutory language at hand proves is that, as one astute observer has commented:

> ". . . overemphasis on legislative guides may lead to a distorted view of the statutory purpose no less than literalism, for much less thought is spent on the future implications of committee reports and explanations on the floor than in choosing the words of a statute . . ." A. Cox, "Judge Learned Hand and The Interpretation of Statutes," 60 Harv.L.Rev. 370, 381 (1947).

Bankruptcy Act, that is the generally equal distribution of assets among creditors. As stated earlier, both Franklin, FDIC's predecessor in interest, and Commonwealth filed liens within four months of IBB's petition. If the bankruptcy court has jurisdiction, the liens may be invalidated. To recognize the priority of FDIC and Commonwealth, IBB argues, would give them an advantage over foreign creditors in derogation of Congress' intention to ensure generally equal distribution among creditors.[13]

We agree with FDIC and Commonwealth that this argument presupposes jurisdiction under the Act and is of no relevance to the initial determination whether jurisdiction exists. The purpose of enacting the exceptions in § 4 was not to achieve equality of distribution, but to avoid application of the bankruptcy laws to what Congress viewed as inappropriate situations.

VIII.

Conclusion

Despite the variegated mechanisms available to interpret legislation, "the final rendering of the meaning of a statute is an act of judgment."[14] Where scrutiny of the legislative history unearths no clue that Congress has considered application of the statute to the particular facts at hand and where adherence to the statutory words themselves does not frustrate the general objectives of the legis-

13. See *Disconto Gesellschaft v. Umbrecht*, 208 U.S. 570, 582, 28 S.Ct. 337, 341, 52 L.Ed. 625 (1908) in which the Supreme Court noted ". . . the well recognized rule between states and nations which permits a country to first protect the rights of its citizens in local property before permitting it to be taken out of the jurisdiction for administration in favor of those residing beyond its borders."

14. Frankfurter, "Some Reflections on the Reading of Statutes," *supra*, 30 Harv.L.Rev. at 531.

lation, the words must be given effect as they read. Here the words of the statute read:

> "(a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt."

and must in the circumstances be taken to mean what they say: that foreign banking corporations are precluded from seeking adjudication as voluntary bankrupts.

In reaching this conclusion we make no attempt to pronounce what Congress' action might have been had it ever considered whether foreign banks should be accorded the right to file voluntary petitions. To do so would be to rush in where angels fear to tread. As Justice Frankfurter wisely advised:

> "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities . . . Various considerations of parliamentary tactics and strategy might be suggested for the inaction of . . . Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock,* 309 U.S. 106, 119, 121, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940).

The decision of the Bankruptcy Court is reversed. The petition of Israel British Bank is dismissed.

It is so ordered.

APPENDIX C

In the Matter of
ISRAEL-BRITISH BANK
(LONDON) LIMITED

Bankrupt
In Bankruptcy No. 74 B 1322

S.D. N.Y.
December 19, 1974

JOHN J. GALGAY,
Bankruptcy Judge

OPINION

On September 23, 1974, a voluntary bankruptcy petition was filed in this court on behalf of Israel British Bank (London) Ltd (IBB) and on the same date it was adjudicated a bankrupt. An amended petition dated October 1, 1974 was filed on October 10, 1974, containing identical allegations as those in the original petition, the only difference being that the amended petition contained the verification of the Provisional Liquidator of Bankruptcy proceeding commenced in the United Kingdom on August 2, 1974.

On September 26, 1974, Franklin National Bank and the Bank of the Commonwealth filed motions to vacate the adjudication of bankruptcy made upon the filing of the voluntary petition of IBB and to dismiss the voluntary petition of IBB filed on September 23, 1974 upon the ground that this court lacks jurisdiction over the subject matter of the proceedings under the provisions of Section 4a of the Bankruptcy Act.

A conference on scheduling and briefing was held by this court on September 30, 1974. Briefs were submitted by all parties prior to oral argument on the aforesaid motions and the arguments were heard on October 22, 1974.

On the papers submitted and on oral argument, two questions are presented.

1) Do lien creditors who obtained their liens by attachment against the property of the bankrupt within four months of the filing of a voluntary petition have standing to contest such petition?

2) Does the exclusion of a "banking corporation" in Section 4 of the Bankruptcy Act extend to a foreign banking corporation?

Background

According to Franklin's papers its interest in this proceedings [*sic*] arises out of IBB's failure to repay on July 11, 1974 the principal and interest of more than $2,100,000 owing on a Euro-dollar loan or deposit made to it by Franklin. On July 26, 1974, Franklin filed a complaint in the United States District Court for the Southern District of New York captioned *Franklin National Bank* v. *Israel-British Bank (London) Ltd,* 74 Civ 3232, seeking payment of this Euro-dollar deposit.

On the same date Franklin obtained an Order of Attachment which was served on a number of banking institutions in New York City in connection with its suit. IBB failed to plead in Franklin's suit and was in default prior to the filing of its petition herein. Franklin however has been stayed from proceeding to judgment and execution by the filing of IBB's petition.

According to the papers submitted by Bank of the Commonwealth, a banking corporation organized and existing under the laws of the State of Michigan, it loaned IBB $500,000 U.S. Dollars on April 16, 1974, payable on July 15, 1974 with interest at the prime rate plus 1%. On July 22, 1974 when the loan remained unpaid, it commenced an action in the United States District Court, Southern District of New York, Docket No. 74 Civ 3101 (CTG) for the recovery of money loaned plus interest. On the same day it obtained an Order of Attachment in the sum of $515,385.42 plus probable interest. The Order of Attachment was served

on a number of garnishees and attachments made thereunder.

On August 6, 1974 personal service of Summons & Complaint was made on IBB in London and affidavits of service filed in this court. Upon the failure of IBB to appear or answer, the Bank of the Commonwealth obtained a judgment in the sum of $519,923.90 which was entered in this court on September 11, 1974. Execution was levied by a deputy U.S. Marshal on assets of IBB previously attached. However, before the Bank of Commonwealth could compel payment of the monies levied upon, IBB filed its unverified voluntary petition in bankruptcy on September 23, 1974.

Against this background, the motions of Franklin and Commonwealth were filed and the two questions previously noted arise.

Facts

IBB is a corporation organized under the laws of the United Kingdom and engaged in the banking business with its principal offices in the United Kingdom.

On August 2, 1974, pursuant to the Bankruptcy Act of the United Kingdom, petitioner voluntarily filed a debtor's petition for the winding up of its affairs with the High Court, Chancery Division of the United Kingdom.

On or about August 6, 1974, a receiving order was made by the High Court, Chancery Division of the United Kingdom, constituting Arthur Thomas Cheek, Senior Official Receiver, Receiver and Provisional Liquidator of the property of petitioner.

Petitioner has had its principal place of business and its principal assets in London, United Kingdom, and has never had any place of business or its principal assets in this District or any other District of the United States for the preceding six months or for longer portion thereof.

Petitioner has property in this District in the form of deposits of money held by five banks in New York City.

Counsel for petitioner has represented to this court that petitioner never did business in the United States, never was licensed to do business in the United States, never qualified to do business in the United States, never had an office in the United States and never had an agent in the United States. These representations are uncontroverted by the moving parties.

Neither of the moving parties has made a motion to intervene pursuant to Rule 24, F.R. Civ.P., Bankruptcy Rule 724 and Bankruptcy Rule 121 and the court has made no order previous hereto permitting intervention.

As to the first issue raised in the proceeding, i.e., whether or not creditors have standing to contest the adjudication following the filing of the petition and to move to dismiss the same, this court decided at the oral argument that Franklin and Commonwealth had such standing. It is true that the statute does not speak directly to this issue, however, the cases make it clear that creditors have such standing in the very limited areas which involve fraud or a challenge to the subject matter jurisdiction of the court. *Chicago Bank of Commerce* v. *Carter,* 61 F.2d 986 (8th Cir. 1932). *In re*: *Ettinger,* 76 F.2d 741 (8th Cir. 1935); *Mulligan* v. *Federal Land Bank of Omaha,* 129 F.2d 438.

Should there be error in that conclusion, the court has the right to raise the question of subject matter jurisdiction *sua sponte* and for the purpose briefing and arguing the questions, it can request the creditors to appear as *amicus curiae, In re: Ettinger (supra).*

Franklin and Commonwealth each challenged the court's subject matter jurisdiction and out of caution, the court acting *sua sponte,* invited them to argue the question as *amicus curiae.*

As to the second issue, IBB has property within the jurisdiction of this court. It is a foreign banking corporation that has not qualified to do business in the United States or in any of the states thereof and never had a place of business therein.

It appears from the foregoing that Section 2a(1) of the Bankruptcy Act and Rule 16a(2)(b) of the Rules of Bankruptcy Procedure vests this court with jurisdiction over IBB provided the proper person invoked the jurisdiction of the court and further, provided that it does not come within the exception of "banking corporation" contained in Section 4a of the Bankruptcy Act.

Counsel for the petitioner has submitted what he contends to be the authority under the law of the United Kingdom to the effect that the Provisional Liquidator in the British proceedings has authority to act for the corporation in filing the voluntary petition in this District. He further volunteered that if it became necessary, ratification by the Board of Directors of the IBB could be obtained to obviate any question of authority to file the petition under *In re: Jefferson Casket Co.* which relates to general corporation law of the State of New York—25 ABR 663. He submitted the exchange of telegrams reciting this court's question to him regarding the authority to file the instant voluntary proceeding and the British counsel's reply. There was also submitted the Order of the High Court of Justice, Chancery Division, Companies Court appointing one of the official Receivers attached to the court to be Provisional Liquidator of IBB dated August 6, 1974. Also submitted was an Order of the same court entitled "Leave to Employ Attorneys" dated October 9, 1974. That order authorized the employment of Krause, Hirsch & Gross of New York "to act for said company (IBB) and to investigate and report to the Official Receiver—and to take such steps and to institute such proceedings including the filing of a bankruptcy petition against the company as they may advise and as the said Official Receiver may authorize them to take to insure that the assets of the said company

situated in the United States of America become available for the benefit of creditors general." Copies of this material were furnished to the moving parties and remains uncontroverted.

On the basis of the record before me I am satisfied that the filing of this voluntary petition is properly authorized by the Court in the United Kingdom.

I conclude as a matter of law that IBB as a foreign banking corporation that had not qualified to do business in the United States or in any state therein, and that never had a place of business there, is not exempted from and is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt.

In reaching this conclusion reference to legislative and statutory history is necessary and relevant in determining the meaning of the language of Section 4a in the present Act. *Boston Sand & Gravel* v. *United States,* 278 U.S. 41 (1928). Simply put, the question is, did Congress intend to include within the exception of "banking corporation" in that section, foreign banking corporations as well as domestic banking corporations.

This court is persuaded that the legislative history supports the conclusion that Congress intended to exclude from the scope of the Act only national banking corporations and banking corporations created under state or territorial laws and therefore foreign banking corporations in the position of the petitioner are not excepted from the Act.

The legislative history of the Bankruptcy Act of 1898 and the modifications of Section 4 thereof in 1903 and 1910 demonstrates that Congress intended to except from Section 4 only those entities whose insolvency was covered by specific Federal and State law. This exclusion applies to "municipal, railroad, insurance or banking corporations." However, foreign banking corporations which are not subject to specific State and Federal banking laws, are not

among the excluded categories. An examination of congressional intent through the history of the words of the exception to Section 4 supports the view that the exclusion from Section 4 applies only to domestic corporations.

Section 4(b) of the Act of 1898 specifically excluded "national banks or banks incorporated under State or Territorial Laws" from the benefits of filing an *involuntary* petition. (Public Law 171, 55th Cong., 30 Stat. L. 544, Chap. 541). During the debate over the amendments of 1903, Congress refrained from re-examining its exception of national, state and territorial banks. (36 Cong. Rec. 1035, 57th Cong. 2nd Sess. (1903). However, in 1910, when Congress redrafted Section 4, allowing corporations to file a voluntary petition in bankruptcy under Section 4a, the exception, to both 4a and 4b was restated to read, "except municipal, railroad, insurance or banking corporation[s]." This change in language as stated by the sponsor of the amendment "did not, in that particular case, change the law at all." (Statement of Congressman Sherley in hearing before sub-committee No. 1 of the Committee on the Judiciary in H.R. 18694 (Bankruptcy) February 3, 1910 at 4). Thus, it can be concluded, that the exclusion of banking corporations remain limited to national, state and territorial banks as before. The 1910 amendment does not imply an extension of the exclusion to foreign banking corporations. The exception to Section 4 is based on two factors. First, the entities excluded are public or quasi-public in nature and are clearly affected by a public interest. Secondly, there are specific provisions in either federal or state laws for the liquidation of such entities outside of the Bankruptcy Act. See statement of Sen. William Lindsay, 30 Cong. Rec. 602, 606, 55th Cong. 1st Sess. (1897) and the statement of Congressman Bodine on the United States Senate Floor, 31 Cong. Rec. 1939, 55th Cong. 2nd Sess. (1998). The conference Committee Report, 21 Cong. Rec. 6426, 55th Cong. demonstrates congressional purpose.

"The local railroad and transportation companies and banks incorporated under any law are left to be dealt with by the laws of the State creating them."

When dealing with an exception to a statute, it is a basic rule of construction that such exemption or exception be narrowly construed. *Korherr* v. *Buml* 262 F.2d 157, 162 (9th Cir 1958); *Midland Cooperative Wholesale* v. *Ickes,* 125 F.2d 618, 626 (8th Cir. 1942). Previous judicial constructions of Section 4 narrowly construed exclusions from jurisdictions under the Bankruptcy Act. *In re: Bay Cities Guaranty Bldg. & Loan Association,* 48 F.2d 623, 624 (S. D. Calif 1931).

The case law supports the conclusion that only national and state banking corporations and not foreign banking corporations come within the exclusion of the Bankruptcy Act. Those cases contain statements by the courts expressing what they considered to be Congress' intention in excluding certain corporations from bankruptcy as well as Congressional intent in amending the Act in 1910. *In re: Supreme Lodge of the Mason's Annuity,* 286 F. 180, 184 (N. D. Ga. 1923), cited with approval by the Fourth Circuit in *Sims* v. *Fidelity Assurance Ass'n,* 129 F.2d 442, 448 (4th Cir. 1942), *aff'd* 318 U.S. 607 (1943).

The following quote from *Woolsey et al.* v. *Security Trust Company et al.,* 74 F.2d 334, 337 (5th Cir. 1934) contained in petitioner's proposed findings and conclusion is particularly expressive of the reasons for the exclusions under Section 4 and the chaos and confusion which is avoided by the operation of such exclusion.

> "The letter of that section excludes banking and insurance corporations; its spirit and purpose, to leave the liquidation of the banking corporations of the country to the well-organized departments of the states and the nation, organized for the purpose of supervising while they are going concerns and of liquidating them when they are not, excludes them. Federal laws provide elaborately for the supervision

> and liquidation of national banking corporations; the laws of the states do the same for state banks and insurance companies, in order to protect the millions of persons who deal with them on the faith of the protection afforded by direct governmental supervision and control. It was considered that it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings, and it was intended by withdrawing jurisdiction over these corporations from the bankruptcy court, that this would not occur. It would be directly contrary to the purposes so definitely and comprehensively expressed to exempt banking corporations from the act, leaving their administration and liquidation to the state and federal systems devised expressly for them, to hold that this bank and trust company is not exempt, chartered though it was under the state banking laws, with banking privileges and powers, operated though it was under those laws, and not being liquidated as it is, under them."

Foreign banking corporations not doing business in the United States are not subject to Federal or State supervision while they are going concerns and there is no regulatory agency in the United States to govern their liquidation hence they should be and are subject to the benefits of, the Bankruptcy Act.

The scant writings in legal periodicals on this subject also seem to support the view Congress intended to exclude only national and state banking corporations and not foreign banking corporations.

"Journal of the National Association of Referees in Bankruptcy" (Vol 36, No. 2, 1962) by Charles Seligson and Lawrence P. King; "Revision of Conflicts Provisions in the American Bankruptcy Act," 1 *National and Comparative Law Quarterly* (4th Ser.) 483 (1952) London, England, reprinted in *Journal of National Association of Referees*

in Bankruptcy (Vol 27, No. 2) April 1953, under title "Revision of Conflicts Provisions in the American Bankruptcy Act" by Kurt H. Nadelmann.

The objectives of the Bankruptcy Act include a design to bring about an equitable division of the bankrupt's assets among its creditors and conversely to protect against one creditor obtaining unfair advantage over other creditors. *Sampsell* v. *Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941); 3 *Colliers* (14th Ed) Sec. 60.01 Pg 743.

Congress has provided a trustee in Bankruptcy through the Bankruptcy Act, a variety of remedies to accomplish the objective of equitable distribution among creditors as the Act related to individuals, partnerships and corporations. However, it excluded from that coverage those entities including "banking corporations" which would be liquidated under the supervision of experts in the banking field as provided by Federal laws governing national banks and State law for state banks.

As stated previously this alternative regulatory device for liquidation is not available in the case of a foreign banking corporation not doing business in the United States. The effect of finding that the petitioner is within the jurisdiction of this court is to support the Congressional objective of equality of distribution and allow the trustee herein to examine the merits of the movant's claims, judgments and liens and move, if necessary, within the framework of the Act to insure such equality among creditors.

The motions to dismiss the voluntary petition is [*sic*] denied in all respects.

SO ORDERED.

/s/ JOHN J. GALGAY

Dated: NEW YORK, N.Y.
December 19th 1974

APPENDIX D

BANKRUPTCY ACT

Sections 1(8), 1(23), 2(a)(1), and 4, 11 U.S.C. §§ 1(8), 1(23), 11(a)(1), and 22.

§ 1(8) "Corporation" shall include all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships and shall include partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association, joint-stock companies, unincorporated companies and associations, and any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument.

§ 1(23) "Persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are forbidden under this title shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees or of other similar controlling bodies of corporations. July 1, 1898, c. 541, § 1, 30 Stat. 544; Apr. 12, 1900, c. 191, § 34, 31 Stat. 84; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; May 27, 1926, c. 406, § 1, 44 Stat. 662; June 7, 1934, c. 426, 48 Stat. 926; June 25, 1936, c. 804, 49 Stat. 1921; June 22, 1938, c. 575, § 1, 52 Stat. 840; June 28, 1946, c. 512, § 1, 60 Stat. 323; July 7, 1952, c. 579, § 1, 66 Stat. 420; June 23, 1959, Pub.L. 86-64, § 1, 73 Stat. 109; July 5, 1966, Pub.L. 89-495, § 1, 80 Stat. 268.

§ 2(a) The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be

hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to—

(1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this title. July 1, 1898, c. 541, § 2, 30 Stat. 545; Apr. 12, 1900, c. 191, § 34, 31 Stat. 84; Feb. 5, 1903, c. 487, § 1, 32 Stat. 797; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; June 25, 1910, c. 412, §§ 1, 2, 36 Stat. 838, 839; May 27, 1926, c. 406, § 2, 44 Stat. 662; June 22, 1938, c. 575, § 1, 52 Stat. 842; July 7, 1952, c. 579, § 2, 66 Stat. 420; Sept. 25, 1962, Pub.L. 87-681, §§ 1, 2, 76 Stat. 570; July 5, 1966, Pub.L. 89-496, § 1, 80 Stat. 270; Oct. 19, 1970, Pub.L. 91-467, § 1, 84 Stat. 990.

§ 4 (a) Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this title as a voluntary bankrupt.

(b) Any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipal, railroad, insurance, or banking corporation, owing debts to the amount of $1,000 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this title. The bankruptcy of a corporation shall not release its officers, the members of its board of directors or trustees or

of other similar controlling bodies, or its stockholders or members, as such, from any liability under the laws of a State or of the United States. The status of an alleged bankrupt as a wage earner or farmer shall be determined as of the time of the commission of the act of bankruptcy. July 1, 1898, c. 541, § 4, 30 Stat. 547; Feb. 5, 1903, c. 487, § 3, 32 Stat. 797; June 25, 1910, c. 412, §§ 3, 4, 36 Stat. 839; Feb. 11, 1932, c. 38, 47 Stat. 47; May 15, 1935, c. 114 § 1, 49 Stat. 246; June 22, 1938, c. 575, § 1, 52 Stat. 845.